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Hearing Date: May 5, 2017
Hearing Time: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
---X
In re:

THE FRESH ICE CREAM COMPANY LLC.,

Debtor.
---X

Chapter 11
Case No. 17-40716 (ess)

DEBTOR'S MOTION SEEKING ENTRY OF: (I) SALE PROCEDURES ORDER (A) APPROVING ASSET PURCHASE AGREEMENT BETWEEN THE DEBTOR AND DGI VENTURES, INC. FOR THE PURCHASE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, SUBJECT TO HIGHER AND BETTER OFFERS, (B) AUTHORIZING THE USE OF THE CONTRACT DEPOSIT, (C) APPROVING A BREAK-UP FEE AND EXPENSE REIMBURSEMENT, (D) APPROVING THE BIDDING PROCEDURES AND MANNER OF NOTICE AND (E) SCHEDULING AN AUCTION AND SALE APPROVAL HEARING; AND (II) SALE APPROVAL ORDER: (A) CONFIRMING THE RESULTS OF THE AUCTION AND AUTHORIZING THE CONSUMMATION OF THE SALE IN ACCORDANCE THEREWITH, (B) GRANTING THE SUCCESSFUL BIDDER GOOD FAITH STATUS, AND (C) GRANTING RELATED RELIEF

**TO: THE HONORABLE ELIZABETH S. STONG,
UNITED STATES BANKRUPTCY JUDGE:**

The Fresh Ice Cream Company LLC, the above captioned debtor and debtor-in-possession ("Debtor"), by its attorneys DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby files this motion ("Motion") pursuant to sections 105(a), 363(b), (f) and (m), 503, and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the

"Bankruptcy Rules") and Rules 6004-1 of the Local Rules for the United States Bankruptcy Court for the Eastern District of New York (the "Local Rules") and Administrative Order No. 557 issued by Chief Bankruptcy Judge for the Eastern District of New York on March 29, 2010 which governs assets sales in Bankruptcy, for the entry of two Orders:

- **Sale Procedures Order** (substantially in the form annexed hereto as **Exhibit A**): (i) approving the Asset Purchase Agreement between the Debtor and DGI Ventures, Inc. ("Purchaser") dated April 18, 2017, providing for the purchase and sale of substantially all of the Debtor's assets ("Assets"), free and clear of all liens, claims and encumbrances, subject to higher and better offers (the "APA[1]", a copy of which is annexed hereto as **Exhibit B**), (ii) authorizing the Debtor's immediate use of the contract deposit in accordance with the terms of the APA, (iii) approving a break-up fee and expense reimbursement for the Purchaser, (iv) approving bidding procedures, annexed hereto as **Exhibit C** to govern the auction (the "Auction") and the manner of notice and (v) scheduling an Auction and sale approval hearing to confirm the results of the Auction ("Sale Approval Hearing"); and

- **Sale Approval Order** (i) confirming the results of the Auction and authorizing the consummation of the sale in accordance therewith, (ii) granting the successful bidder good faith status and (iii) granting such other relief as is just and proper.

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the APA.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O).

2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

3. This proceeding has been initiated pursuant to Bankruptcy Code §§ 105(a), 363(b), (f) and (m), 503, and 507, Bankruptcy Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 9007 and 9014, and Local Rule 6004-1.

BACKGROUND

4. On February 17, 2017, (the "Filing Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Thereafter the Debtor's proceeding was referred to this Court for administration under the Bankruptcy Code.

5. The Debtor has continued as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

6. An official committee of unsecured creditors ("Creditors Committee") was recently appointed by the United States Trustee and same is represented by the law firm of Westerman Ball Ederer Miller Zucker & Sharfstein, LLP.

7. No trustee or examiner has been heretofore appointed in this proceeding.

8. The Debtor owns and operates a frozen dairy and non-dairy dessert company under the well-known ice cream brand name *Steve's Ice Cream*. The Debtor develops, produces, manufactures (through third parties) and distributes its products to distributors and national retailers throughout the Northeast and West Coast.

9. Since acquiring the business in 2008, David Stein ("Stein") has acted as its

manager, focusing the business on wholesale distribution as opposed to its former model of retail "mix-ins" ice cream parlors which is how the storied brand began in 1973.

10. The Debtor was forced to file bankruptcy after several years of challenges with both prior management as well as its packaging, all of which resulted in losses and reduction of working capital. These challenges landed the Debtor in a vicious cycle as the loss of working capital and mounting creditor issues crippled the Debtor's operations.

The Debtor's Marketing Efforts

11. Once the Debtor's principal was able to resolve the prior management issues and take greater control of the day to day operations of the company, it became clear that a strategic transaction was necessary in order for the Debtor to survive, let alone grow.

12. As a veteran of the food industry and specifically the ice cream industry, Stein quickly reached out to a variety of potential strategic players in order to explore the possibility of a cash infusion either in the way of new investment or a loan. He also contacted other parties to see if there was interest in a possible acquisition of the company and/ or its assets. This process has been ongoing for several years, and over the last twelve months Stein has focused nearly all of his time to this end having engaged in dialogue with no less than twenty-two (22) different potential strategic partners. Several parties engaged in extensive due diligence, including one who elected not to proceed just prior to a closing (on a major investment), whose promises the Debtor unfortunately relied upon to its detriment.

13. These efforts have continued since the Filing Date and ultimately resulted in the negotiation and execution of the APA, which the Debtor believes is a fair market value price for the Assets.

14. The Debtor's decision in conducting a pre-confirmation sale of the Assets under

§363 of the Bankruptcy Code, as opposed to approving a sale of its assets through a chapter 11 process, was based upon the Debtor's inability to sustain operations due to a lack of working capital, together with its restricted use of cash collateral in the Chapter 11 case.

15. The Debtor still has a loyal customer base, but each and every order that it is unable to fill jeopardizes the valuable brand recognition and "real estate" (retail shelf space) which it has worked so hard to obtain. Given the competitiveness in the Debtor's industry, keeping its product on the shelf and in the market place is key to preserving and protecting the value of the Debtor's Assets. The Debtor believes that the time necessary to accomplish a sale of its Assets through a chapter 11 plan, especially given the outside date that the Purchaser has required to Close, could jeopardize the sale in its entirety at worst, and at best, will result in a significantly diminished recovery to the creditors of the estate.

The Asset Purchase Agreement

16. On April 18, 2017, after arms-length negotiations, the Debtor and the Purchaser executed the APA. Subject to this Court's approval of higher and/or better offers through an auction process, the Debtor seeks approval to sell the Assets to the Purchaser on the following terms and conditions:

A. The APA [2]

Seller:	The Fresh Ice Cream Company LLC
Purchaser:	DGI Ventures, Inc.
Purchase Price:	The purchase price for the Assets shall be One Million Dollars ($1,000,000.00), subject to adjustment.
	Deposit. The Purchaser shall pay to Seller $100,000 upon execution of the APA which shall be held by the Debtor's counsel in escrow until entry of

[2] The following summary is qualified entirely by the terms of the APA. To the extent there are any inconsistencies between the description of the APA contained herein and the terms and conditions of the APA, the terms of the APA shall control.

the Sale Procedures Order, at which time it may be used by the Debtor for the purchase of new finished inventory of ice cream pints and materials, including ingredients and packaging used to produce such new finished inventory. The Purchaser shall be entitled to an allowed administrative expense claim in the Bankruptcy Case in the amount of the Deposit until such time as it is applied to the Purchase Price at Closing or returned pursuant to Section 8 of the APA.

Balance. The balance of the Purchase Price, after crediting the full amount of the initial Deposit and any adjustments pursuant to Section 2.3 of the APA, shall be due and payable, by bank or cashier's check or wire transfer, at Closing.

Assets to be Sold: All of the assets of the Debtor of any kind, tangible and intangible, and wherever located, including without limitation, (i) any or all inventories of finished goods, ingredients, and packaging materials on hand at Closing (collectively, "Inventory") as set forth on Schedule 1.1(i)[3]; (ii) all storage or manufacturing equipment as set forth on Schedule 1.1(ii); (iii) customer contracts, relationships and lists as set forth in Schedule 1.1(iii); (iv) contracts with suppliers, distributors and co-packers as set forth on Schedule 1.1(iv) ("Operating Contracts"); (v) all of the Seller's Intellectual Property and Confidential Information (as hereinafter defined), including but not limited to the Intellectual Property and Confidential Information set forth on Schedule 1.1(v); and (vi) all right, title and interest in any or all unfilled purchase orders pending at the Closing that were entered into in the ordinary course of business, as set forth on Schedule 1.1(vi).

Excluded Assets: The Debtor's (i) cash and cash equivalents; (ii) accounts receivable; (iii) the Purchase Price; (iv) any causes of action which the Debtor may have against third parties, related and unrelated to the Bankruptcy Case; (v) corporate books and records of the Debtor; (vi) the Operating Contracts listed on Schedule 1.2(vi); (vii) any Inventory listed on Schedule 1.2(vii); or (viii) any unfilled purchase orders listed in Schedule 1.2(viii) (collectively, the "Excluded Assets").

Representations and Warranties: The representations and warranties and covenants are customary for a transaction of this type, including, without limitation, representations and warranties regarding the authority to enter into the sale transaction, (non) existence of brokers, violation of laws or contracts and condition

[3] The term "Schedule(s)" shall mean the corresponding schedule annexed to the APA and as such schedule may be updated and/ or amended as provided for therein.

	of the Assets, status of customers and contracts.
Closing Date:	The Closing shall take place at the offices of Debtor's counsel no later than ten (10) days after entry of the Sale Approval Order (assuming the waiver by the Bankruptcy Court of the 14-day stay, otherwise the closing shall be fifteen (15) days after the entry of the Sale Approval Order), unless otherwise agreed by the parties in writing. The foregoing notwithstanding, in the event that the Closing has not occurred by June 30, 2017 and the parties have not mutually agreed to an extension of such deadline in writing, either party shall have the right to terminate this Agreement by serving written notice pursuant to Section 8 of the APA.

B. "Extraordinary" Provisions

17. The APA contains the following provisions which the Bankruptcy Court deems "Extraordinary Provisions" and as such, are hereby separately disclosed:

Engagement of Debtor's Principal:	The APA contemplates that the Purchaser's obligation to close is conditioned upon entering into an employment or consulting agreement with Stein on terms and conditions mutually acceptable to both parties.
Use of Deposit:	The APA contemplates that upon entry of the Sale Procedures Order, Debtor's counsel shall be authorized to release the Deposit from its escrow account to the Debtor in order that the Debtor may use the Deposit for the purchase of new finished inventory of ice cream pints and materials, including ingredients and packaging used to produce such new finished inventory. The Purchaser shall be entitled to an allowed administrative expense claim in the Bankruptcy Case in the amount of the Deposit until such time as it is applied to the Purchase Price at Closing, or repaid pursuant to Section 8 of the APA.
Relief from Bankruptcy Rule 6004(h)	Although not expressly set forth in the APA, the Debtor hereby seeks relief from the fourteen-day stay imposed by Bankruptcy Rule 6004(h) in the event that observing the stay shall result in a Closing after the June 30, 2017 closing deadline.

RELIEF REQUESTED AND BASIS THEREFORE

18. By this motion, the Debtor seeks entry of two orders: (i) the Sale Procedures Order; and (ii) Sale Approval Order.

A. The Proposed Bidding Procedures and Auction Notice

19. The Sale of the Assets pursuant to the APA is subject to higher and/or better offers. In order to ensure that the highest and best offer is received the Debtor has established the proposed Bidding Procedures to govern the submission of competing bids at an Auction. These Bidding Procedures have been negotiated extensively with the Purchaser and are contained in the APA.

20. The Debtor contemplates a marketing and due diligence period of approximately thirty (30) days, with an ultimate bidding deadline of June 5, 2017 ("Bidding Deadline"). However, the Debtor reserves the right to extend the Bidding Deadline if it determines that such extension will enhance the bidding process.

21. As set forth above, the Debtor has already marketed the Assets extensively throughout the frozen dessert and general food industry over the past twelve (12) months, if not longer. Given Stein's efforts on this front and given his extensive experience and contacts in the industry, the Debtor is confident that all parties who may have been interested in acquiring the Assets have been contacted or provided notice in various forms that the Assets were and remain available for sale.

22. The foregoing notwithstanding, the Debtor intends to serve the Sale Procedures Order, together with a formal Notice of Auction and Bidding Procedures, on all parties who the Debtor has previously communicated with regarding an investment or sale as well as additional parties which Stein and the Creditors' Committee believe may have an interest in bidding. This list will include over thirty industry investors, brand owners, ice cream companies, distributors and other food industry players. In addition, each and every creditor and interest holder will receive such notice. The Debtor believes that the foregoing notice, especially when considering that the industry is well aware and likely "watching" the instant chapter 11 proceeding, constitutes

more than sufficient marketing efforts to ensure that any party who may be truly interested in bidding, will be adequately notified.

23. The Bid Procedures further provide that in order to participate in the Auction, the bidder must be deemed a Qualified Bidder by the Debtor which shall be determined in its reasonable business discretion. Such determination shall be based upon each prospective bidder's demonstration of financial wherewithal to consummate the transaction as well as its compliance with all other terms and conditions set forth in the APA and Sale Procedures Order.

24. To submit a Qualified Competing Bid, such bid must (i) offer to purchase the Assets in an amount not less than $1,200,000 and upon the terms and conditions substantially similar to or better than those set forth in the APA, (ii) deposit in escrow with the Debtor's counsel, an amount equal to ten percent (10%) of its initial bid, (iii) not be conditioned on obtaining financing or the outcome of unperformed due diligence, (iv) not be conditioned upon the Bankruptcy Court's approval of any bid protections, such as break-up fees, termination fees, expense reimbursement, or similar type of payment, and (v) is accompanied by a copy of the APA clearly and conspicuously marked to show any amendments and modifications thereto. It should be noted that a bid may take the form of either an asset sale, a chapter 11 plan or some other form of strategic transaction.

25. The Purchaser shall be deemed a Qualified Bidder in the amount of $1,000,000.

26. In the event bids, other than that of the Purchaser, are received prior to the Bid Deadline, an Auction will be conducted on June 7, 2017. A hearing to approve the Successful Bidder will be held before the Bankruptcy Court shortly thereafter, subject to the Court's availability. The Successful Bidder will be required to close within fourteen (14) days of entry of the Sale Approval Order.

27. As part of the Bidding Procedures, the Debtor seeks approval of a Break-Up Fee of 3% of the Purchase Price ($30,000) and an additional Expense Reimbursement, subject to verification, of up to $30,000. (The Break-Up fee and the Expense Reimbursement are referred to in the aggregate as the "Termination Fee"). The Termination Fee, plus the repayment of the Deposit are payable to the Purchaser upon the Closing of an Alternative Transaction.

28. In addition, the Bidding Procedures provide that bidding increments shall be not less than $20,000 following the initial overbid. However, the Debtor reserves its right to increase or reduce such amount in its reasonable discretion if it determines that a modification will encourage more competitive bidding or is otherwise appropriate.

29. In addition to the designation of the highest and best bid at Auction, the Debtor shall also have the right to designate a Back-Up Bidder whose deposit shall be held in escrow until the Closing of a transaction with the Successful Bidder. In the event that the Successful Bidder is unable or unwilling to close, the Back-Up Bidder shall be obligated to proceed to Closing.

30. In determining whether bidding procedures governing the sale of a debtor's assets are adequate, Court have consistently deferred to the debtor's business judgment for their specific industry. See, *In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992) (holding that where overbid procedures are negotiated by the chapter 11 debtor, the business judgment rule applies and said procedures are "presumptively valid"). The purpose of bidding procedures is to solicit the highest and best bid, which would in turn best benefit the creditors. *In re Financial News Network Inc.*, 980 F.2d 165 (2nd. Cir. 1992) (stating that the bankruptcy court's principal responsibility relating to bidding procedures that govern sale is to secure best possible bid for benefit of creditors).

31. Thus, courts deem appropriate those bidding procedures intended to maximize the value of the debtor's estate. *See, e.g.*, *Financial News*, 980 F.2d at 170-71 (allowing bidder to supplement one of two bids for Chapter 11 debtor's assets after bidding was closed since the revision was consistent with both rules by which particular auction was being conducted and reasonable expectations of bidders); *Integrated Resources*, 147 B.R. at 656-57.

32. The Debtor believes that the Bidding Procedures, as set forth in more detail in Exhibit C are fair, reasonable, likely to encourage competitive bidding, and will result in the highest and best price for the Assets at Auction. Furthermore, the Bidding Procedures will permit all parties truly interested in acquiring the Assets an opportunity to submit a bid that can be weighted or compared against the APA.

B. The Break-Up Fee and Expense Reimbursement are Appropriate

33. It has become an established practice in chapter 11 cases to approve break-up fees and other forms of bidding procedures in connection with the sale of significant assets pursuant to section 363 of the Bankruptcy Code. *See, e.g., Integrated Resources*, 147 B.R. at 662; *In re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24 (Bankr. S.D.N.Y. 1989). Break-up fees enhance the bidding process by inducing a "white knight" to submit a bid by providing compensation for the risks it is undertaking and to cover the costs of due diligence. *995 Fifth Ave. Assoc*., 96 B.R. at 28.

34. Generally, Courts approve break-up fees unless they are unreasonable or appear more likely to chill the bidding process than to enhance it. *Integrated Resources*, 147 B.R. at 662. When examining whether break-up fees are reasonable and appropriate, the Courts examine (1) the relationship between the parties negotiating the break-up fee for any self-dealing or taint; (2) whether the fee hampers, as oppose to enhances, bidding; and (3) whether the amount of the break-up fee is unreasonable as compared to the purchase price. *Id.*

35. The Termination Fee in this instance is appropriate since (1) the Debtor and the Purchaser negotiated at arms- length through separate legal counsel, (2) it provides both an incentive for the Purchaser to enter into the APA as well as a protection given the investment it is required to make and effort it is required to employ in conducting its due diligence and negotiating the APA, all the while not knowing whether it will be the successful bidder, and (3) the amount of the Break-Up Fee is only 3% of the Purchase Price, and when taken together with the Expense Reimbursement is only a maximum of 6%.

36. The amount of the Termination Fee is in the same order of magnitude as break-up fees approved in other cases. *See, e.g., Financial News*, 98 F.2d at 167 (approving $8.2 million, or 5.5% break up fee on a $149.3 million sale); *LTV Aerospace and Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 198 B.R. 848, 861 (Bankr. S.D.N.Y. 1996) (approving $20 million, or 4.4% break-up fee on $450 million offer); *Integrated Resources*, 147 B.R. at 662 (approving break up fee representing 3.2% of bidders expenses, or 1.6% of the purchaser price). *Compare, In re Twenver, Inc.*, 149 B.R. 954, 956 (Bankr. D.Colo. 1992) (denying break-up fee of 10% of bid).

37. In addition to the factors stated above, the Termination Fee will provide a minimum floor bid on which other bidders may rely upon. The Purchaser has stated that it will not provide the deposit or move forward as the stalking horse buyer absent approval of the Termination Fee, which was extensively negotiated by the parties' respective counsel.

38. Accordingly, under the circumstances, the Debtor submits that both the Break-Up Fee and Expense Reimbursement are reasonable and appropriate.

C. The Proposed Manner of Notice of Sale is Adequate

39. Bankruptcy Rule 2002(a) and (c) requires the Debtor to notify creditors of the

proposed sale of the Assets, including the date, time and place of the Auction, terms of the Sale, and the deadline for filing any objections.

40. The Debtor proposes to comply with these requirements by serving via first class mail within three (3) days of entry of the Sale Procedures Order copies of: (i) Sale Procedures Order and (ii) Bidding Procedures.

41. The Debtor proposes to serve the following parties: (i) the Office of the U.S. Trustee; (ii) counsel to the Purchaser; (iii) all taxing authorities; (iv) counsel to the Creditors' Committee; (v) all known creditors of the Debtor; (vi) all potential buyers known by the Debtor as having previously expressed interest in acquiring any of the Assets, (vii) all of the Debtor's interest holders and (viii) all parties that have requested notice pursuant to Bankruptcy Rule 2002.

42. The Debtor submits that the foregoing notice fully complies with the requirements set forth in Bankruptcy Rule 2002 and 6004. Based upon the foregoing, the Debtor respectfully requests that this Court approve the manner of the notice proposed above.

D. The Auction

43. If the Debtor receives one or more Qualified Competing Bids in addition to the APA, the Debtor will conduct the Auction to select the highest or best bid for the Assets (the "Successful Bid"). The Auction, which shall be transcribed or recorded to the extent required under New York local practice, shall be held at 10:00 a.m. (prevailing Eastern time) on June 7, 2017, at the offices of at the offices of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, White Plains, NY 10601, or such other location as shall be agreed by the Debtor and the Creditors' Committee and timely communicated to all entities entitled to attend the Auction.

44. The Debtor, in consultation with the Creditors' Committee, will conduct the

Auction in any manner and upon any terms and conditions satisfactory to the Court, permitted by the APA, and consistent with the Bidding Procedures, that will achieve the maximum value for the Assets. Such terms and conditions may include, by way of example, one or more rounds of sealed or open bids from the Purchaser and any Qualified Bidder who submitted a Qualified Competing Bid. The initial bid at the Auction shall be the highest or otherwise best bid, as determined by the Debtor in its reasonable discretion, as among the Purchaser's bid and any Qualified Competing Bids, and such initial bid shall be announced to the Purchaser and any other Bidder submitting a Qualifying Competing Bid at the commencement of the Auction.

45. At the conclusion of the Auction, the Debtor shall submit the Successful Bid to the Court at the Sale Approval Hearing, for entry of a Sale Approval Order. Any Bid that fails to comply with the Bidding Procedures or any other procedures established at the Auction may be refused.

46. If no Qualified Competing Bids are received, the Debtor and the Purchaser intend to seek immediate Court approval of the APA without conducting an Auction.

47. Prior to the conclusion of the Auction, the Debtor, in consultation with the Creditors' Committee, will (a) review and evaluate the Purchaser's bid and each Qualified Competing Bid, (b) identify the highest or otherwise best offer for the Assets received at the Auction (such bid, the "Successful Bid" and the bidder making such bid, the "Successful Bidder") as well as the Back-Up Bidder and (c) communicate to the Purchaser and the Qualified Competing Bidders the identity of the Successful Bidder, the Back-Up Bid, and the details of each. These determinations shall be final, subject to approval by the Court at the Sale Approval Hearing.

48. The sale of the Assets shall be pursuant to Section 363 (b) and (f) of the

Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, "The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." §363 (f) of the Code states as follows:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

49. The conditions set forth in 11 U.S.C. §363(f) are in the disjunctive, which means that only one of the tests must be met. The Debtor believes that the Purchase Price for the sale of the Assets in this manner is in the best interests of the estate and its creditors, for a variety of reasons, including the following: (i) the Debtor believes that the Purchase Price represents the highest and best price for the Assets; (ii) the Purchase Price is adequate and represents fair market value of the Assets to be sold; and (iii) the sale proceeds will be sufficient to satisfy all administrative and secured creditors of the estate with a substantial return to the unsecured creditors pursuant to a liquidating chapter 11 plan.

50. It is therefore submitted that Section 363(f) is satisfied and an immediate sale of the Assets is in the best interests of creditors and the estate and will prevent unnecessary, irreparable harm to the creditors and the estate.

51. Since the Auction contemplated hereby is not in the ordinary course, its authorization requires notice and a hearing pursuant to Section 363(b) of the Code. Auction sales are specifically authorized under the Bankruptcy Code and F.R.B.P. Rule 6004(f) provides that, "All sales not in ordinary course of business may be by private sale or public auction."

52. It is within the discretion of the Court to determine whether to approve or disapprove of a method for the disposition of property. *In re Alves*, 52 B.R. 353 (Bankr. D.R.I. 1985); *See, generally, In re Stogsdill*, 102 B.R. 587 (Bankr. W.D. Tex. 1989). As stated above, the Assets include substantially all of the Debtor's operating assets, other than the Excluded Assets.

53. If, following the entry of the Sale Approval Order, the Successful Bidder fails to consummate the Sale because of a breach or failure to perform on the part of the Successful Bidder, the Back-Up Bid will be deemed the new Successful Bid, and the Debtor will be authorized, but not required, to consummate the Sale with the bidder who submitted the Back-Up Bid without further order of the Court. In such case, the good faith deposit of the Successful Bidder shall be forfeited to the Debtor and the Debtor shall have the right to seek any and all other remedies and damages from the defaulting Successful Bidder to the extent permissible under the applicable purchase agreement and law.

54. All of the sale proceeds will be received by the Debtor, with all liens, claims, interests and encumbrances, to attach to the proceeds in accordance with Section 363(f) of the Bankruptcy Code, and shall be held in escrow by Debtor's counsel pending further order of the Bankruptcy Court.

55. The Debtor respectfully submits that the APA, subject to higher and better offers received at an Auction, will provide the greatest recovery for the Debtor's estate than would be

provided by any other available alternative. In addition, the terms and conditions of the APA will be tested in the market through an auction process, which will support the fairness and reasonableness of the consideration being received. Therefore, the Debtor requests that the Court authorize and approve the APA and the sale of the Assets in the method and manner set forth herein.

E. Protections as a Good Faith Purchaser

56. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from a debtor notwithstanding that the sale conducted under Section 363(b) is later reversed or modified on appeal. *See Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) ("Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification of an unstayed order, whether or not the transferee knew of the pendency of the appeal").

57. The selection of the Successful Bidder will be the product of an arm's-length, good-faith negotiation in a competitive purchasing process. Based on the record to be made at the Sale Approval Hearing, the Debtor will request a finding that the Successful Bidder is a good-faith purchaser entitled to the protections of Section 363(m) of the Bankruptcy Code.

F. Request For Debtor To Use Deposit Prior to Closing

58. The Debtor has negotiated with Purchaser for the use, prior to the sale and Closing, of the Deposit in order to manufacture new inventory. This will avoid the need for the Debtor to essentially sit dormant pending sale and Closing and help preserve the tradename and going concern value of the Debtor. Given that inventory is included in the Assets, the use of the Deposit can only benefit the estate. The Debtor will be able to take and fill new purchase orders thereby allowing it to maintain (limited) operations, generate profits (cash) pending closing. On

the other hand, the longer that the Debtor is unable to operate or to accept and fulfill purchase orders, the more its market share is diminished as is the value of the brand and the Assets.

59. In exchange for the use of the Deposit, Purchaser has merely requested treatment of the amount that is actually used as an administrative claim as well as a credit at closing, dollar for dollar, to the extent that the value (at cost) of the newly manufactured inventory (not otherwise on hand at the time of the APA execution) at Closing, is less than $100,000.

60. The use of the Deposit can only serve to benefit the estate and its creditors as it protects if not significantly maximizes the value of the Assets to be sold and enables the Debtor to operate and generate profits in the interim period.

F. **Waiver of the 14-day Stay**

61. The APA provides that if the Closing does not occur by June 30, 2017, the Purchaser may terminate the APA. This was a term specifically insisted upon by the Purchaser and Debtor has no reason to believe that such deadline will be extended.

62. As such, , the Debtor submits that cause exists to justify a waiver of the 14-day stay in order that it may close immediately upon entry of the Sale Approval Order and avoid the potential termination by the Purchaser of the APA.

CONCLUSION

63. For all of the foregoing reasons, the Debtor respectfully requests entry of (i) the Sale Procedures Order, substantially in the form annexed hereto as Exhibit A and (ii) entry of the Sale Approval Order, in a form to be sufficiently in advance of the Sale Approval Hearing, together with such other and further relief as this Court deems just and proper.

WHEREFORE, the Debtor respectfully requests that the Court grant all of the relief requested herein, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York
April 21, 2017

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